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Supreme Court of The United States

October Term, 1958

No. 114

JOSEPH HIRAM HOLT, JR., A MINOR
BY HIS NEXT FRIEND,
JOSEPH HIRAM HOLT, and ELWYNA HOLT,

Petitioners,

vs.

THE RALEIGH CITY BOARD OF EDUCATION,
A BODY CORPORATE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

BRIEF OF THE ATTORNEY GENERAL OF NORTH CAROLINA AMICUS CURIAE

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BRIEF OF THE ATTORNEY GENERAL OF NORTH CAROLINA AMICUS CURIAE

INTEREST OF THE STATE OF NORTH CAROLINA

The State of North Carolina, through its Attorney General, files this brief as amicus curiae pursuant to the provisions of Rule 42, Paragraphs four and five, of the Revised Rules of the Supreme Court of the United States.

The primary issue in this case revolves around the correct construction or interpretation of the Assignment and Enrollment of Pupils Act of the State of North Carolina (Article 21 of Chapter 115 of the General Statutes—Cumulative Supplement of 1957). The statutes which constitute this Article appear as Petitioners' Appendix G on p. 68. The Attorney

General of North Carolina appeared as amicus curiae for the State when this case was tried in the Federal District Court and also filed a brief and argued the case when it was heard before the United States Court of Appeals for the Fourth Circuit. The State of North Carolina, therefore, is highly interested in this case because it involves an interpretation of the substantive and procedural provisions of the above-cited Article which are in force and have State-wide application. The Attorney General of North Carolina believes that the District Court of the United States and the United States Court of Appeals for the Fourth Circuit have both construed, interpreted and applied this article in a proper manner and in accordance with the previous decisions of the United States Court of Appeals for the Fourth Circuit as well as the Supreme Court of North Carolina.

The State is highly interested in a proper construction of this Article, believes that the Federal Courts have properly construed the Article and hopes that the question is now set at rest so that the proper assignment of pupils to the public schools of all races in North Carolina may now be administered and carried out without so much litigation.

The State of North Carolina is further interested in this case for the reason that it is believed that the statutes which compose the Article in question, and as interpreted by the two Federal Courts, can be administered so as to permit an unhurried but effective translation into action of the principles announced by this Court in the *Brown* decision.

The State of North Carolina is further interested in the result of this case for the simple reason that it represents a renewed attack on this Article, and one of the successive and apparent never ending steps on the part of Counsel for the Petitioners to seek to place the entire operation of the public school system of the State in the hands of the Federal Courts for administrative purposes.

Last of all, the interest of the State of North Carolina is

plain and clear. The Assignment and Enrollment of Pupils Act contains and expresses a State-wide policy on this subject. It is vital that this policy as construed and set forth by the two Federal Courts shall continue to prevail and that the State shall be allowed within reasonable constitutional limits to choose its own method of bringing about a solution of the problem with which the State is now faced.

OPINION BELOW

The Opinion of the United States District Court for the Eastern District of North Carolina is reported as 164 F. Supp. 853 and also appears as Appendix D, p. 32 of the Petition of Petitioners. The Opinion of the United States Court of Appeals for the Fourth Circuit is reported as 265 F. 2d 95 and appears in the Appendix of the Petition as Appendix B, p. 22. The decree of the District Court appears as Appendix C, p. 30 of the Petitioners' Petition, and the decree of the United States Court of Appeals for the Fourth Circuit is attached to the Petition of Petitioners and appears as Appendix A, p. 21. Since these matters are all set forth in the appendixes of the Petitioners we do not think it is necessary to again duplicate these decrees and opinions.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioners pursuant to 28 USCA 1254(1) and 28 USCA 2101(c).

QUESTIONS PRESENTED

There is only one real question presented in this case, and our version of the question is as follows:

Did the District Court of the United States for the Eastern District of North Carolina and the United States Court of Appeals for the Fourth Circuit correctly construe, interpret and apply Article 21 of Chapter 115 of the General Statutes of North Carolina—Cumulative Supplement of 1957—to the facts in this case?

We are aware of the fact that Counsel for the Petitioners have renewed their attack on the Assignment and Enrollment of Pupils Article by attempting to say at this juncture that this Assignment and Enrollment Article places an unconstitutional burden on Petitioners. We will show later on in our Argument that this presentation of the question is entirely invalid and improper.

Counsel for the Petitioners undertake to present a question formulated on the theory that the doctrine of exhaustion of administrative remedies should not have been applied at all in this case. We will show in our Argument that this question was never presented and is now improperly presented in this Petition.

Counsel for Petitioners also attempt to present a question based upon an assumption that Petitioners were either denied the right to counsel or that right to counsel was abridged, and this resulted in a denial of Petitioners' constitutional rights. As we will show later on, no such situation ever existed.

In presenting their questions in this Petition Counsel for Petitioners have utterly ignored the theory on which this case was tried in the District Court.

STATEMENT OF THE CASE

This cause was heard by the District Court on July 14 and 15, 1958. Petitioners' jurisdictional statements were based upon 28 USCA 1331, 28 USCA 1343(3) and 28 USCA 2201. The adult Petitioners sought to have the minor Petitioner, Joseph Hiram Holt, Jr., admitted to Needham Broughton Senior High School, in Raleigh, North Carolina. The facts are well stated and clearly bring everything into view in the complete and full Findings of Fact made by the District Judge, and these Findings appear in his Opinion (HOLT v. RALEIGH CITY BOARD OF EDUCATION, 164 F. Supp. 853, 856). Briefly, the Petitioners in their pleading allege their citizenship, residence and eligibility of the minor Peti-

tioner to attend the Raleigh City Schools operated by the Raleigh City Board of Education; while Petitioners allege that the schools are operated on a segregated basis and that all schools in Raleigh are operated in violation of Petitioners' constitutional rights, yet this matter was not pressed before the District Judge as to the schools in general, and the case was clearly tried on the theory of whether or not the Petitioners had properly exhausted the administrative remedy provided by the Assignment and Enrollment of Pupils Article of the North Carolina State Laws. The chief allegation was that the minor Petitioner lived closer to the Needham Broughton Senior High School than he did to Ligon School where he was assigned. The Court will see from the Findings of Fact (see Finding of Fact No. 6) that the minor Petitioner also alleged in his application that Needham Broughton Senior High School would give him a fuller academic and extra-curricular program.

After a Motion to Dismiss had been overruled, the Respondent School Board filed an Answer, which appears in the Record, and because of the State-wide policy involved in the statutes the Attorney General of North Carolina filed a Brief Amicus Curiae in the District Court and participated in the argument on the question only of the proper interpretation of the Pupil Assignment and Enrollment Article. The Attorney General did not engage in any contest on the merits of the case except as to any facts that pertain to the administrative remedy. Actually the Court will see from the Record no attack was made by the Petitioners below on the constitutionality of the State Statute, and the only complaint of the Petitioners was as to the administration of the Statute.

SUMMARY OF ARGUMENT

The Attorney General, in summarizing his Argument, would emphasize the following:

(a) The State of North Carolina has never defied or placed itself in a state of resistance to the principles established and

decided by this Court in the case of BROWN v. BOARD OF EDUCATION OF TOPEKA, 347 U. S. 483, 98 L. ed. 873; 349 U. S. 294, 99 L. ed. 653. This has been clearly demonstrated by pronouncements of the Supreme Court of North Carolina, statements in the Report of the North Carolina Advisory Committee on Education and by pronouncements of State public officials.

(b) Colored students have already been admitted to schools previously considered as white schools in the cities of Goldsboro, Greensboro, Winston-Salem and Charlotte. At the time of the writing of this Brief action has been taken in Greensboro to consolidate two schools which will further result in the admission of colored children to a school theretofore considered as a white school.

(c) The Assignment and Enrollment of Pupils Article of this State has already been declared to be constitutional on its face by the United States Court of Appeals for the Fourth Circuit, and Petition for Certiorari to review this decision was denied by this Court. It is not denied, of course, that the Assignment and Enrollment of Pupils Article can be applied and administered in an unconstitutional manner but this problem is not presented in this case.

(d) Putting to one side the question of the exhaustion of State administrative remedies, the questions presented by Counsel for Petitioners in this Petition for Certiorari were not passed on by either the District Court or the Court of Appeals for the Fourth Circuit.

(e) The Petitioners' contention that the State administrative remedy, as set forth in the Assignment and Enrollment of Pupils Article, has been applied in such a fashion as to penalize the Petitioners or has been applied in such manner as to constitute an unconstitutional burden was not passed upon by either the District Court or the Court of Appeals for the Fourth Circuit, and such question was not raised by the Petitioners in their pleadings.

(f) The right of Petitioners to counsel and the right to a hearing before any State administrative agency has never been unconstitutionally denied or abridged.

(g) The Petitioners did not properly exhaust the State's administrative remedy, and the two lower Federal Courts have correctly construed the State Statute.

ARGUMENT

I

NORTH CAROLINA RECOGNIZES THAT THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES ARE THE SUPREME LAW OF THE LAND, AND NEITHER THE STATE NOR ITS SUBDIVISIONS OF GOVERNMENT HAVE TAKEN ANY POSITIONS CONTRARY TO THE DECISIONS OF THIS COURT.

As a separate and distinct matter and before we enter into our general argument we strongly emphasize before this Court the fact that Counsel for the Petitioners have never been interested in the minor Petitioner as an individual and that their interest has only extended as far as the minor Petitioner could be useful to them in maintaining an action in which they could seek an advisory opinion from this Court. We will now explain to this Court why we make this statement. *If the Court will examine the judgment, or decree, entered by the United States District Judge for the Middle District of North Carolina in this action (see Petitioners' Appendix C, p. 30 of Petition) the Court will find that the District Judge as a part of the judgment, or decree, ordered the following:*

"3. The Plaintiffs are not entitled to the relief prayed for.

"A judgment will be entered in conformity with this opinion unless the plaintiffs file a written motion within ten days requesting that the case be retained on the docket for the purpose of giving them an opportunity to adequately exhaust their administrative remedies."

In other words, had Counsel for the Petitioners desired to do so and had they had the interest of the minor Petitioner at heart, they could have by a simple motion requested that this case be retained on the docket until they had taken the necessary steps to correctly and properly exhaust the administrative remedy. We are warranted, therefore, in making the statement that Counsel for Petitioners simply wanted to have a lawsuit and were more interested in an advisory opinion than in the welfare of the minor Petitioner. We also call the Court's attention to the fact that the Court will search the evidence in vain for any expression on the part of the minor Petitioner, who testified in the case, that he ever actually wanted to go to Needham Broughton Senior High School, or, in other words, that it was his own heart's desire to attend that school.

We have already called the Court's attention to the fact that in this State colored students have been admitted to schools which were previously called or denominated "white" schools in several cities of the State and that the process is now going on in a careful and deliberate manner. No doubt the action of the State is too slow for many of our citizens and too fast or entirely contrary to the views of many other citizens of the State. What we really want this Court to consider is the fact that we are through the machinery of the Assignment and Enrollment of Pupils Article making progress in compliance, and there is some ground to believe that if we are allowed to continue we may arrive at a practical and workable solution to the cause. Perhaps the only thing that will defeat this is the continuous and harassing litigation fostered by organizations outside the State. We would not be frank with the Court if we did not say that the vast majority of the citizens of the State are not in agreement with the principles announced in the *Brown* case but the sober and conscientious people in the State, as well as the State's public officials, have decided to work out the problem, if possible, in accordance with the principles of the Federal Constitution as construed by this Court.

It would take too long to give all of the illustrations of this

attitude but it is sufficient to call the attention of this Court to the case of CONSTANTIAN v. ANSON COUNTY, 244 N. C. 221, 93 S. E. 2d 163, in which the Supreme Court of North Carolina decided that the provision in the State Constitution which established segregated schools as between the white and colored races was invalid and no longer effective in view of the decision of this Court in the Brown case. The Supreme Court of North Carolina in the above-cited case said:

> "Our deep conviction is that the interpretation now placed on the Fourteenth Amendment, in relation to the right of a state to determine whether children of different races are to be taught in the same or separate public schools, cannot be reconciled with the intent of the framers and ratifiers of the Fourteenth Amendment, the actions of the Congress of the United States and of state legislatures, or the long and consistent judicial interpretation of the Fourteenth Amendment. However that may be, the Constitution of the United States takes precedence over the Constitution of North Carolina. Constitution of North Carolina, Article I, section 3 and 5; Constitution of the United States; Article VI. In the interpretation of the Constitution of the United States, the Supreme Court of the United States is the final arbiter. Its decision in the Brown Case is the law of the land and will remain so unless reversed or altered by constitutional means. Recognizing fully that its decision is authoritative in this jurisdiction, any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid."

It should be noted that the Honorable William P. Rogers, Attorney General of the United States, quoted excerpts from the above quotation in his address delivered before the Thirteenth Annual Meeting of the National Conference on Citizenship, held at the Statler-Hilton Hotel, in Washington, D. C., on September 17, 1958 (See Department of Justice's release to morning papers, Thursday, September 18, 1958).

The North Carolina Advisory Committee on Education in its Report to the people of the State likewise stated that the decision was unprecedented and a reversal of established law, but the Committee also said the following:

> "The decision of the Supreme Court of the United States, however much we dislike it, is the declared law and is binding upon us, ****We must live and act now under the decision of that Court. We should not delude ourselves about that. ****The Supreme Court has declared that the principle upon which our system was built, and upon which it has rested, is no longer valid. So, we do not have the problem of 'preserving our school system.' The Supreme Court of the United States destroyed the school system which we had developed - - a segregated-by-law system. Our problem is, rather, to build a new system out of the Supreme Court's wreckage of the old. This fact governs our whole approach to the problem."

The North Carolina Advisory Committee on Education in its recommendation No. 2, made to the people of the State and to the Governor and General Assembly, said:

> "Specifically, we recommend that all school units: 2. Recognize that since the Supreme Court decision there can be no valid law compelling the separation of the races in the public schools."

It should also be pointed out that the Honorable William P. Rogers, Attorney General of the United States, in his speech before the California State Bar Convention, delivered on Wednesday, October 8, 1958, quotes, with approval, from a speech of the Attorney General of North Carolina, as follows:

> "It is encouraging that responsible voices are beginning to be heard with more frequency. Ministers, school boards, parent-teacher associations, students, and some state officials are speaking out courageously and realistically. For example, the Attorney General of North Carolina said last week:
>
> "'Those states which seek to evade have been and will continue to be unsuccessful, and, to those states, there are but two avenues which remain open - - an obedience to the law, or avoidance of the law. To avoid the law, the state merely goes out of the business of public education. That day should never come to North Carolina.'"

Our only chance and our only hope is for this Court to up-

hold and support us in our Assignment and Enrollment of Pupils Article so long as our local officials give objective and impartial administration in carrying out these statutes.

There are no laws whatsoever on the statute books of North Carolina that require segregation of pupils in the public school system, and, in fact, the Public School Laws of the State do not mention race or color. We believe, therefore, that the rulings of the United States Court of Appeals for the Fourth Circuit, which have heretofore been rendered, represent a sane and balanced view on an attempted solution of this problem and that these decisions should be upheld, and, if so, then this Court will have assisted us in saving our schools by staying within approved constitutional limitations.

II

EXCEPT FOR EXHAUSTION OF ADMINISTRATIVE REMEDY THE QUESTIONS NOW PRESENTED BY PETITIONERS WERE NEVER PASSED ON BY THE LOWER FEDERAL COURTS.

If this Court will examine the Record it will see that nearly all of the primary or ultimate facts are embraced in a stipulation signed by Counsel for the parties concerned, with perhaps some few additional facts found by the District Court from the record in evidence apart from the stipulations. So far as we can recall there are no serious exceptions to the Findings of Fact, and these Findings having been concurred in by the Circuit Court of Appeals for the Fourth Circuit it would appear that they are adequate to dispose of the case, and since these Findings now have the status of concurrent findings by two Federal Courts under the so-called "Two-Court Rule", this Court would not disturb such findings except for some extraordinary reason (BAKER v. SCHOFIELD, 243 U. S. 114, 61 L. ed. 626, 630; WILLIAMS MFG. CO. v. UNITED SHOE MACH. CORP., 316 U. S. 364, 86 L. ed. 1537; GRABER TANK & MFG. CO v. LINDE AIR PRODUCTS CO., 336 U. S. 271, 93 L. ed. 672).

The court below did not pass on any question relating to

the North Carolina Assignment Article as an unconstitutional, burdensome, procedural discrimination, nor did the court below pass on the question as to whether the North Carolina law as formulated and applied imposed an unconstitutional penalty and burden upon Petitioners. If the Court will examine the Opinion of the District Judge (HOLT v. RALEIGH CITY BOARD OF EDUCATION, 164 F. Supp. 853) it will be seen that the question of exhaustion of the administrative remedy, according to the interpretation of the North Carolina statutes, is the primary thing considered by the District Court, and the Court having decided that the remedy was not properly exhausted did not reach the question as to whether the reassignment was refused on account of race. That this is particularly true and is the view of the Circuit Court of Appeals for the Fourth Circuit this Court will see that the Circuit Court of Appeals in this connection said (HOLT v. RALEIGH CITY BOARD OF EDUCATION, 265 F. 2d 95, 98):

> "With these and other pertinent considerations in mind the District Judge might not have felt obliged to dismiss the complaint if he had reached the merits of the case, but he was restricted in the scope of his decision by the failure of the plaintiffs to do their part in giving effect to the plan of the statute. In so doing, he was acting in accordance with the rule approved by this court that persons aggrieved by the actions of the school officials of a State may not appeal for relief to the Federal courts until they have exhausted the remedies afforded them by the statutes of the State."

If this Court will examine the pleadings, and especially the Complaint of the Petitioners, it will be seen that they have never really attacked the constitutionality of the Assignment and Enrollment of Pupils Article; that is, they did not renew their attack, for these same attorneys tried to have this Act declared unconstitutional in the case of CARSON v. WARLICK, 238 F. 2d 724, cert. den. 353 U. S. 910, 1 L. ed. 2d 664. The statute passed upon by the Fourth Circuit in CARSON v. WARLICK, supra, was subsequently amended but the only changes made were: the words "assignment" and "as-

sign" are now used instead of "enrollment" and "enroll", and it was made definite in the statute as to the number of days' notice that should be given for an appeal; in other words, the only thing accomplished by the amendment was clarification and more definite procedural standards for the benefit of applicants and petitioners. The case of CARSON v. WARLICK, supra, and the principles therein set forth have been approved in several cases: ORLEANS PARISH SCHOOL BOARD v. BUSH, 242 F. 2d 156, 164--Fifth Circuit; SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA, v. ALLEN, 240 F. 2d 59, 64--Fourth Circuit; HOOD v. BOARD OF TRUSTEES OF SUMTER COUNTY SCHOOL DISTRICT, 232 F. 2d 627, cert. den. 352 U. S. 870, 1 L. ed. 2d 76.

It is strange that Counsel for Petitioners would contend that because they are required to exhaust an administrative remedy that this is an unconstitutional deprivation of rights. To be sure, the requirement of exhaustion of an administrative remedy requires some extra burden, but the rule is well established, and no reason can legally exist which should make Petitioners an exception to the rule. The cases decided by this Court on the subject are listed by the Circuit Court of Appeals for the Fourth Circuit in the case of CARSON v. BOARD OF EDUCATION OF McDOWELL COUNTY, 227 F. 2d 789, 790.

We have not touched upon all of these questions but the Court will observe that they were not passed upon by the two lower Federal Courts, and this being true, the well-known rule should be applied that this Court will not consider or pass upon things, positions or contentions which were not considered and passed upon below (WALTERS v. ST. LOUIS, 347 U. S. 231, 98 L. ed. 660; BEAUHARNAIS v. ILLINOIS, 343 U. S. 250, 96 L. ed. 919; SHERMAN v. UNITED STATES, 356 U. S. 369, 2 L. ed. 2d 848; UNITED STATES v. FLEISCHMAN, 339 U. S. 349, 94 L. ed. 906, 916--last paragraph of opinion; ELLIS v. DIXON, 349 U. S. 458, 99 L. ed. 1231, 1234; ULLMAN v. UNITED STATES, 350 U. S. 422, 100 L. ed. 511 --head notes 24, 25).

The contention that the North Carolina Assignment and Enrollment Article confers unwarranted investigatory powers upon the School Board is untenable for the reasons given by the Circuit Court of Appeals for the Fourth Circuit in this case.

III

PETITIONERS DID NOT EXHAUST THE ADMINISTRATIVE REMEDY PROVIDED BY THE STATE

This Court has affirmed the general principles involved in an assignment or placement statute operated or administered in a state public school system (SHUTTLESWORTH v. BIRMINGHAM BOARD OF EDUCATION, 162 F. Supp. 372, motion to affirm granted, ——— U. S. ———, 3 L. ed. 2d 145). As we have previously pointed out this Court also had an opportunity to review the ruling of the Circuit Court of Appeals for the Fourth Circuit in the case of CARSON v. WARLICK, supra, which upheld the constitutionality of the North Carolina Assignment or Placement Statute but this Court declined to review the ruling of the Circuit Court of Apeals. We, of course, recognize that such placement statutes are always open for further consideration on the question of proper and non-discriminatory administration by local or state officials.

The North Carolina Assignment and Enrollment of Pupils Article has been approved by the rulings in other circuits and is not open to the charge that it furnishes an inadequate remedy. We have also pointed out that the court below did not pass on the question that the local school board had adopted a hard and fast policy of segregation, which, of course, it has not, and, as we have pointed out, colored pupils have already been admitted to so-called white schools in the State of North Carolina. Of course, an assignment or enrollment statute is utterly useless if it is to be set aside and rendered entirely ineffective upon bare allegation that the local authorities are determined to follow a policy of segregation. Here it is very easy to show that in all the cases where

such has been the case the local school authorities have clearly shown what they intended to do and Counsel for the Petitioners have always attempted to bring this, as well as their other cases, within the purview of the rulings of those courts who have said that if the administrative remedy is futile it need not be pursued at all (HOLLAND v. BOARD OF PUBLIC INSTRUCTION OF PALM BEACH COUNTY, 258 F. 2d 730-5th Circuit, 1958; KELLY v. BOARD OF INSTRUCTION OF THE CITY OF NASHVILLE, 159 F. Supp. 272, M.D. Tenn., 1958; GIBSON v. BOARD OF PUBLIC INSTRUCTION, 246 F. 2d 913-5th Cir., 1957). To this line of cases we could also add the Virginia cases where the administrative remedy and the placement statute were held to be unconstitutional and totally inadequate (ADKINS v. SCHOOL BOARD OF NEWPORT NEWS, 148 F. Supp. 430; affirmed 246 F. 2d 325-4th Cir.). In the case of GIBSON v. BOARD OF INSTRUCTION, supra, the Board of Public Instruction of Dade County, Florida, had passed a resolution saying: "Until further notice the free school system of Dade County will continue to be operated, maintained and conducted on a non-integrated basis." This Court has always said (SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA v. ALLEN, 240 F. 2d 59-4th Cir., 1956) that where an application, because of a preconceived order, resolution or policy, would always result in a referral to a segregated school, the proceedings would be futile. The case of HOLLAND v. BOARD OF INSTRUCTION OF PALM BEACH COUNTY, supra, is in the same category. It is quite evident that in the Holland case there was a strong feeling that the school districts had been gerrymandered and arranged so as to provide for segregated schools, and the Court of Appeals for the 5th Circuit, therefore, said:

> "In the light of compulsory residential segregation of the races by city ordinance, it is wholly unrealistic to assume that the complete segregation existing in the public schools is either voluntary or the incidental result of valid rules not based on race."

It will be seen, therefore, that the same Fourth Circuit

which held that the Virginia Placement Statute was inadequate and that attempted compliance was futile has also held that the North Carolina Statute is valid and adequate and has adequate and sufficient standards, and needless to say, the Raleigh City School Board well knows that colored pupils who are otherwise eligible to attend schools that have heretofore been designated as white schools must be admitted. To be sure some of the schools in the State are at the present time in the same status as to attendance that existed before the *Brown* decision, and this is easily explained because the whole school system had operated for many decades under the doctrine of PLESSY v. FERGUSON, 163 U. S. 537, 41 L. ed. 256.

The Federal District Court and the United States Court of Appeals for the Fourth Circuit correctly construed the State Statute.

It is clear to us that G. S. 115-178, Cumulative Supplement of 1957, provides for (1) a preliminary application for reassignment made to the Board, which the Board may consider in an *ex parte* manner; at this stage the procedure is in the nature of investigation, and (2) the next stage is that of a hearing which is to be conducted in a *quasi judicial* manner. The fact that plaintiffs did not attend, plus the letter received by the Board from the plaintiffs' attorneys, shows that they intended to sidestep the administrative remedy by means of a mere token compliance. The next step in the administrative exhaustion process is fatal to the position of the plaintiffs. They asked for a hearing in obedience to the language of the statute which says that they may "apply to the Board for a hearing, and shall be entitled to a prompt and fair hearing on the question of reassignment." The statute further says: "A majority of the Board shall be a quorum for the purpose of *holding such hearing* and *passing upon an application for reassignment*****." (Emphasis ours). The statute further says: "The decision of a majority of the members present *at the hearing* shall be the decision of the Board." (Emphasis ours) The next language of the statute clearly shows that the Board is to make findings and how else can findings be made

unless a showing or evidence is produced from which such findings can be made. The statute says: *"If at the hearing the Board shall find****or if the Board shall find****the Board shall render prompt decision upon the hearing."* Every requirement of a formal hearing with evidence produced and findings made is contained in this statute. (Emphasis ours)

The District Court in construing the State Statute relied on MORGAN v. UNITED STATES, 298 U. S. 468, 80 L. ed. 1288, FEENEY v. WILLARD, D. C. S. D. N. Y. 1955, 129 F. Supp. 414, 417, and BOWLES v. BAER, 7 Cir., 1944, 142 F. 2d 787, 789. The Federal District Court also quoted with approval from the case of NATIONAL LAWYERS' GUILD v. BROWNELL, 1955, 96 U. S. App. D. C. 252, 225 F. 2d 552, 555. The Circuit Court of Appeals for the Fourth Circuit upheld this interpretation as supported by these authorities.

The decisions and opinions of both the lower Federal Courts are also supported in their interpretation by certain other cases as follows:

SHIELDS v. UTAH, IDAHO CENTRAL R. CO., 305 U. S. 177, 83 L. ed. 111;

ANDREE & SEEDMAN v. ADMINISTRATOR OF W & H DIVISION, ETC., 122 F. 2d 634, 637;

UNITED STATES v. DILLMAN, 146 F. 2d 572;

GLASSER v. UNITED STATES, 315 U. S. 60, 86 L. ed 680;

N. L. R. B. v. WASHINGTON DEHYDRATED FOOD CO., 118 F. 2d 980, 997;

FRESH-GROWN PRESERVE CORP. v. FEDERAL TRADE COMMISSION, 125 F. 2d 917, 919;

ALABAMA POWER CO. v. FEDERAL POWER COMMISSION, 128 F. 2d 280, 296;

RASE v. UNITED STATES, 129 F. 2d 204, 210;

STEELE v. UNITED STATES, 133 F. 2d 1015, 1022;

UNITED STATES EX REL ENG FON SING v. REIMER, 40 F. Supp. 602, 604;

EX PARTE BRIDGES, 49 F. Supp. 292, 306;

UNITED STATES v. HAYMAN, 342 U. S. 205, 219, 220, 96 L. ed. 232;

POWHATAN MINING CO. v. ICKES, 118 F. 2d 105, 109;

BOWLES v. BAER, 142 F. 2d 787, 789;

SIMMS v. GREENE, 161 F. 2d 87, 89.

In ABELLERIA v. DISTRICT COURT OF APPEALS, THIRD DISTRICT, 109 P. 2d 942, the Supreme Court of California, in commenting on the exhaustion of administrative remedies and the necessity of the completion of these remedies, has the following to say:

> "The question here is whether boards and commissions, charged with the administration of a statute, may carry on their administrative proceedings to completion before being subjected to judicial review. The importance of that issue can hardly be over-estimated, since a curtailment of administrative jurisdiction usually means an enlargement of the duties of the courts in a field in which the courts traditionally are reluctant to enter."

In AIRCRAFT & D. EQUIPMENT CORP. v. HIRSCH, 331 U. S. 752, 91 L. ed. 1796, the Supreme Court of the United States gives the rule, as follows:

> "The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention."

In 73 C. J. S.—Public Administrative Bodies and Procedure—p. 356, sec. 41, the author comments on the review

granted by an administrative agency and the appeal seeking such review, and says:

> "The mere filing of an appeal with the higher administrative agency or officer is not sufficient but the appeal must be fully prosecuted."

In the same volume and the same citation as to Public Administrative Bodies and Procedure, in speaking of the burden of proof the author says in sec. 124:

> "In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof."

The author cites, in Note 58, on p. 444, many cases from both Federal and State jurisdictions to support this statement.

In 42 Am. Jur—Public Administrative Law—p. 496, sec. 150, the author comments on the requirement that evidence is necessary to a hearing and says:

> "The mere holding of a hearing does not justify administrative action required to be based upon a hearing. The decision of the trier of the facts must be reached in accordance with the facts proved, and it must find adequate support in the evidence, formally introduced at the hearing, in all its essential elements."

In AKRON, C. & Y. R. CO. v. UNITED STATES, 67 L. ed. 605, the Supreme Court of the United States defined a full hearing, as follows:

> "A full hearing is one in which ample opportunity is offered to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law of the step asked to be taken."

IV

THE INTERPRETATION OF A LOCAL STATE STATUTE

BY A FEDERAL DISTRICT COURT, WHICH IS APPROVED BY A CIRCUIT COURT OF APPEALS, IS ORDINARILY ACCEPTED BY THIS COURT.

It is quite evident that both lower Federal Courts in construing the Assignment and Enrollment Article of the State of North Carolina have properly construed the statute, and both Courts being in agreement on this phase of the matter the case as to interpretation falls within the rule of this Court as given in the case of BYRD v. BLUE RIDGE RURAL ELEC. COOP., 356 U. S. 525, 2 L. ed. 2d 953, where this Court said:

> "We ordinarily accept the interpretation of local law by the Court of Appeals, cf *Ragan v. Merchants Transfer & Warehouse Co.* 337 U. S. 530, 534, 93 L. ed. 1520, 1523, 69 S. Ct. 1233, and do so readily here since neither party now disputes the interpretation."

It should be emphasized that the statute was construed also by a North Carolina Federal Judge who is familiar with the State Law and who received his training in the schools and courts of the State. We also call the attention of this Court to the holding of this Court in the case of PALMER v. HOFFMAN, 318 U. S. 109, 87 L. ed. 645, where this Court said:

> "Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error."

In STEELE v. GENERAL MILLS, 329 U. S. 433, 91 L. ed. 402, this Court said:

> "The Circuit Court of Appeals has not disagreed with this holding of the District Court sitting in Texas. Under these circumstances we shall leave undisturbed the interpretation placed upon purely local law by a Texas Federal Judge."

The position of the Petitioners that they were entitled to be represented entirely by their attorney cannot be sustained. There are cases, of course, where the validity of a regulation is the only thing in issue, and the appearance of an attorney

to argue the law is sufficient but this is to be distinguished from those cases where petitioners must satisfy an administrative body that they are entitled to the relief sought in their application.

CONCLUSION

Frankly, we cannot see where the Petitioners have made any case which would warrant this Court in granting a Petition for a Writ of Certiorari, in accordance with Rule 19 of the Revised Rules of the Supreme Court of the United States. Certainly no decision has been made on a constitutional question, that is, a Federal constitutional question, which has not heretofore been determined by this Court, nor has any decision been made by the Court of Appeals which is not in accord with applicable decisions of this Court. Certainly no decision has been rendered by the Circuit Court of Appeals for the Fourth Circuit which is in conflict with decisions of other courts of appeal, nor has any decision been made which is in conflict with applicable State Law. In other words, Petitioners have not brought themselves within the Rule which would warrant a granting of this Writ. If the Court will refer to p. 6 of the Brief filed by the Respondent in CARSON v. WARLICK (No. 748) in this Court in opposition to Petition for Certiorari, it will find where the Respondent has shown that the decision is not in conflict with decisions of the other courts of appeal, and this can still be extended to the decisions that have been made since the Certiorari was denied in that case: No. 748, in which Certiorari was denied, is reported as 353 U. S. 910, 1 L. ed 2d 664.

North Carolina as well as some other States, has adopted the method of assignment and enrollment statutes, or, as they are sometimes called, placement statutes, as a gradual solution to problems now presented in re-establishing and reconstituting the public schools on a new basis and according to a new construction of the Constitution. It is believed that by this means an orderly and gradual solution is possible and that this is a step at least towards a working solution (see:

"The Constitution and the Assignment of Pupils to Public Schools" by Dan J. Meador, Vol. 45, No. 4, Virginia Law Review, 1959). If the administration of these statutes in a large number of cases proves to be discriminatory, then there will always be time enough to strike down action under the statutes, as well as the statutes themselves. We ask the Court to support our statute to the end that we may give it a fair trial.

Respectfully submitted,

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